NO. 47547-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHASE DEVYVER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 14-1-00260-4

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On January 21, 2014, the Pierce County Prosecuting Attorney (State) filed an Information charging the defendant, Chase Devyver, with: Count I, murder in the second degree (intentional); Count II, attempted murder in the first degree (premeditated); Count III, robbery in the first degree (deadly weapon or firearm); Count IV, felony eluding. CP 172. The State also alleged deadly weapon of firearm enhancement on all counts. *Id.* As the case moved to trial, the State filed a second amended Information. The State added a count of murder in the second degree (felony murder-assault), changed the attempted murder to assault in the first degree, and added an alternative means of robbery in the first degree (inflicted bodily injury). The State also added a domestic violence designation to the assault charge. CP 1-4.

The case was assigned to the Hon. Kitty-Ann van Doorninck for trial. 1RP 3. After hearing all the evidence, the jury found the defendant guilty of murder in the second degree (CP 30), assault in the second degree (CP 31), robbery in the first degree (CP 32), and felony eluding (CP 33). In an interrogatory, the jury chose assault in the second degree as the predicate for the murder charge. CP 34. The jury also found that the crimes were committed with a deadly weapon (CP 35, 36) or a firearm (CP 38), and the domestic violence designation (CP 37).

The trial court sentenced the defendant, within the standard range, to 275 months on Count I, 29 months on Count II, 75 months on count III, and 6 months on Count IV. CP 112. The court imposed the firearm and deadly weapon enhancements. *Id.* The defendant filed a timely notice of appeal. CP 149.

2. Facts

On January 18, 2014, a group of friends were getting ready for a night of dinks and dancing. Margaret Braswell-Donoho and her roommate, Laura Reneer, were the principal organizers. 3 RP 99, 150. The defendant, Reneer's boyfriend, was her date. 3 RP 148, 152. They were accompanied by Shawn Woods, Nick Lafont, and Caleb Roth, friends and co-workers from the Army. 3 RP 95, 101,103, 5 RP 404.

Braswell-Donoho and Roth were the designated drivers for the night. 3 RP 103. While the women got ready, the men socialized and

drank some shots of whiskey. 3 RP 104. The group headed to Steel Creek, a country bar in downtown Tacoma. 3 RP 99, 156.

When the group arrived in downtown Tacoma, some of them decided to have dinner at a Mexican restaurant a few doors down from the bar. 3 RP 107. The defendant and Lafont went to the bar to get a table. 3 RP 107. When the diners returned to the bar, they found that the defendant and Lafont were showing the signs and effects of alcohol. 3 RP 108, 5 RP 415. Reneer described the defendant as "drunk, livid, and belligerent". 3 RP 159. The defendant and Reneer argued about the defendant's feelings of jealousy. 3 RP 160. Reneer took the defendant aside and calmed him down. 3 RP 160. The group danced and had a good time. The defendant's attitude and sobriety seemed to improve. 3 RP 110, 165.

At closing time, the group left and went to their respective cars. 3 RP 112. Roth and Lafont returned to their home in Lacey. 3 RP 113, 5 RP 419. The rest drove back to Braswell-Donoho's house. 3 RP 114, 165.

Braswell-Donoho went to bed. 3 RP 118. Reneer and the defendant got Woods to the sofa, where he was going to sleep. 3 RP 169. Woods was very intoxicated. He crawled to the bathroom to be sick. 3 RP 170. Reneer and the defendant got him back to the sofa and made sure he was comfortable. 3 RP 171. The defendant went outside to smoke. 3 RP 174. Reneer went out to talk to him. *Id.*

Reneer and the defendant argued over the same issue of the defendant's jealousy. 3 RP 174. Seeing that her reassurances were

ineffective, Reneer reentered the house through the garage, and into the kitchen. 3 RP 175.

As she entered the kitchen, the defendant grabbed her around the neck, from behind. *Id.*, 176. As the defendant tightened his grip, Reneer felt a sharp stabbing pain in her back. 3 RP 175. Reneer screamed at the defendant to stop; that he was hurting her. 3 RP 176. Woods awoke and told the defendant to stop. 3 RP 176. Reneer felt more sharp pains in her back. 3 RP 176. The defendant said to her: "Why would you do this to me now?" 3 RP 177, 6 RP 479.

Woods got up and told the defendant to stop. 3 RP 178. Reneer broke away. 3 RP 179. Woods and the defendant struggled. 3 RP 180,181. Woods fell to the floor and crawled to Reneer. 3 RP 182.

The defendant had a knife and went to wash his hands. 3 RP 183, 184. He returned to Reneer carrying a pistol. 3 RP 185. The defendant held the gun to Reneer's head and demanded her credit card and PIN. *Id.* When she told him that she did not know where her wallet was, he struck her head with the pistol. 3 RP 186.

The defendant told Reneer that he was not kidding. 3 RP 186. He said that if he did not kill her, he was afraid that she would call the police. 3 RP 187. Reneer begged for her life and told him to take her car keys and anything else, and just leave. 3 RP 188. The defendant left in Reneer's car. 3 RP 187.

Reneer woke Braswell-Donoho, who called 911. 3 RP 119. Medical aid showed that Reneer had been stabbed repeatedly in the back; once over the shoulder blade, and once in the thoracic spine. 4 RP 232. Woods had been stabbed three times. 4 RP 308. He suffered a fatal stab wound to his heart. 4 RP 310.

The defendant was later arrested after a high-speed chase. 4 RP 264, 269.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT COMMIT ERROR REGARDING COURTROOM SECURITY.

a. The defendant failed to preserve the alleged error at trial.

Under RAP 2.5(a), issues must be preserved in the trial court before they may be considered on appeal. *See e.g.* ***State v. Emery***, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). One of the few exceptions in RAP 2.5(a) is a "manifest error affecting a constitutional right."

To qualify for the exception, the defendant must show 1) that the alleged error was truly of constitutional dimension, and 2) that the alleged error was "manifest." ***State v. Fehr***, 185 Wn. App. 505, 511, 341 P. 3d 363 (2015). " '[T]he appellant must identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at

trial.' " *Id.*, quoting ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A manifest error is one so obvious on the record that the error warrants appellate review. *See* ***State v. Mohamed*** 187 Wn. App. 630, 350 P.3d 671 (2015).

In the present case, the defendant never objected to the courtroom security arrangements. So, he must demonstrate manifest error regarding a constitutional right.

Courtroom security can be so extreme as to violate the defendant's right to a fair trial. In ***State v. Damon***, 144 Wn.2d 686, 25 P.3d 418 (2001), the Supreme Court observed that "use of restraints may affect the defendant's constitutional rights, including the right to be presumed innocent, the right to testify on one's own behalf, and the right to confer with counsel during the course of a trial." *Id.*, at 691. Also, in ***State v. Jaime***, 168 Wn. 2d 857, 233 P. 3d 554 (2010), the Supreme Court held that holding the defendant's trial in the Yakima County Jail violated his right to a fair trial.

Thus, while courtroom security can raise a constitutional issue, it depends upon the circumstances, as developed in the record. To be "manifest" under RAP 2.5(a), the error must be obvious from the record. In ***Damon*** and ***Jaime***, the objections were made at trial, but the records were also properly developed so that, even if no objection had been made, the circumstances were clear for a reviewing court.

Here, the record only reflects that two corrections officers were present, and that they took the defendant to the elevator. 3 RP 129-132. The defendant fails to show a manifest error of constitutional magnitude. This Court should decline to review this issue.

b. The trial court did not abuse its discretion in determining necessary security measures for the courtroom.

A trial court has broad discretion to determine which security measures are necessary to maintain decorum in the courtroom and to protect the safety of its occupants. ***State v. Damon***, 144 Wn.2d 686, 691, 25 P.3d 418 (2001); ***State v. Hartzog***, 96 Wn.2d 383, 635 P.2d 694 (1981).

Most cases on this topic involve the use of restraints during trial. *See e.g.* ***State v. Finch***, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Even where restraints are involved, there is no outright ban. It must be shown to be necessary and the court must consider less restrictive alternatives before imposing physical restraints. *Id.*, at 846, 849-850.

The presence of security guards in general is not inherently prejudicial. *See* ***Holbrook v. Flynn***, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). In that case, six men were on trial for robbery. In addition to the regular officers providing security, four state troopers, in uniform, were seated in the front row of the spectator section, directly behind the defendants. Defense counsel objected. The Supreme Court held

that this level of security did not violate the defendants' right to a fair trial. *Id.*, at 571.

The defendant cites ***State v. Gonzalez***, 129 Wn. App. 895, 120 P. 3d 645 (2005) to support his argument. App. Br. at 11, 12. Mr. Gonzalez was in custody when his trial began. During the jury selection process, the trial judge actually informed the venire that the defendant could not post bail, was in custody, and was transported in restraints and under guard. 129 Wn. App. at 897. The court then instructed them to remain fair despite all that. *Id.* At the next opportunity when outside the presence of the venire, the defendant moved for a mistrial. *Id.*, at 899. There is no question that such an announcement by the court would be error, resulting in a new trial.

Here, the defendant was not restrained. He was in custody, and so was accompanied by corrections officers. But, unlike the case in ***Gonzalez***, the defendant did nothing. There was no objection or any record. The record does not reflect where the officers were positioned in the courtroom, including their proximity to the defendant. Without a record, or an objection, the defendant cannot demonstrate any error. Even if trial counsel had raised an objection, he would have had to make a record of the facts and circumstances.

In contrast to the dearth of record to support his current argument regarding courtroom security, defense trial counsel properly brought to the court's attention an incident in a nearby hallway where two jurors might

have seen the defendant with the corrections officers. 3 RP 128. Counsel moved for a mistrial. *Id.* Before ruling, the court heard the accounts of the two corrections officers regarding the incident. *Id.*, at 129-132. Informed in detail, the court denied the motion. *Id.*, at 133. In so doing, the court acknowledged that corrections officers were present, and opined (much as the Supreme Court did in ***Holbrook,*** *supra*) that the jurors likely thought nothing of it. 3 RP 133-134. The defendant assigns no error to this decision, or to the way the court handled it. Indeed, there was no error.

c. Inherent authority of the Court of Appeals.

The Court of Appeals has no "inherent authority" to supervise practices or procedures in the trial courts. The Court of Appeals was created by statute. *See* RCW 2.06.010. The State Constitution was also amended to establish it. *See*, Art. IV, §30. The Court has:

> all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

RCW 2.06.030. Therefore, the Court of Appeals only has such powers as granted by statute. *See* ***State v. Pascal***, 108 Wn. 2d 125, 131, 736 P. 2d 1065 (1987), citing ***Maple Leaf Investors, Inc. v. Department of Ecology***, 10 Wn. App. 586, 588, 521 P.2d 742 (1974). It has no rule-making authority, other than granted by statute. *Id.* No statute confers the Court of

Appeals supervisory powers over the Superior Court, or any other trial court. The Court has no "inherent power" to do so.

The defendant cites ***In re Marriage of Wixom and Wixom***, 182 Wn. App. 881, 332 P. 3d 1063 (2014) for the proposition that the Court of Appeals has inherent authority to supervise the trial courts. App. Br. at 16. In ***Wixom***, a divorce case, the trial court ruled that the husband, Mr. Wixom, and his attorney, violated CR 11 and held them jointly liable for $55,000 in attorney fees and costs incurred by Wixom's former wife during a proceeding to modify residential placement of the couple's children.

Wixom and counsel appealed, challenging the sanctions and contesting the findings supporting the court's imposition of terms. Counsel further argued that, if the Court of Appeals upheld the sanctions, Wixom alone should bear the costs. This created a conflict of interest, so the Court of Appeals disqualified counsel from further representation of Wixom in the appeal.

Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representations. *Id.*, at 903. The case does not stand for the proposition that the Court of Appeals has any inherent supervisory authority of the courts.

2. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING VOLUNTARY INTOXICATION.

a. The "voluntary intoxication" instruction was proper.

Voluntary intoxication is not a defense to a crime, but the jury may consider it in determining the mental state element required for the crime. *See* RCW 9A.16.090. The language of WPIC 18.10 is nearly identical to the statute:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted][or][failed to act] with (fill in requisite mental state).

This is a correct statement of the law. *See e.g.* ***State v. Coates***, 107 Wn.2d 882, 735 P.2d 64 (1987); ***State v. Hackett***, 64 Wn. App. 780, 827 P.2d 1013 (1992).

In the present case, the defendant proposed this same instruction, inserting the appropriate mental state. CP 9, 7 RP 702. The court instructed as requested. CP 53. There was no error.

b. If error, it is invited where the defendant proposed the instruction.

"[A] party may not request an instruction and later complain on appeal that the requested instruction was given." ***Seattle v. Patu***, 147 Wn. 2d 717, 721, 58 P.3d 273 (2002), quoting ***State v. Studd***, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)(additional internal citations omitted). Even

where the challenge to a jury instruction raises a constitutional issue, the courts will not consider it if the defendant himself proposed the instruction. ***State v. Winings***, 126 Wn. App. 75, 89, 107 P.3d 143 (2005). The defendant invited any error regarding the voluntary intoxication instruction currently raised on appeal.

3. THE TRIAL COURT CORRECTLY DECLINED TO INSTRUCT ON A LESSER-INCLUDED OFFENSE OF FELONY MURDER IN THE SECOND DEGREE.

a. Under Washington law, manslaughter is not a lesser-included offense of felony murder.

Instructions on lesser-included offenses must satisfy the two-prong test of ***State v. Workman***, 90 Wn.2d 443, 447–448, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Id.*

The Supreme Court has often discussed and wrestled with issues regarding felony murder and whether it has any lesser-included offenses. It is well-settled that manslaughter is not a lesser included offense to either degree of felony murder. *See* ***State v. Tamalini***, 134 Wn.2d 725, 729, 953 P.2d 450 (1998); ***State v. Berlin***, 133 Wn. 2d 541, 947 P. 2d 700 (1997); ***State v. Davis***, 121 Wn. 2d 1, 6, 846 P. 2d 527 (1993); ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (1990). That is because felony murder requires no specific *mens rea*, so the *mens rea* elements necessary do not

agree under the ***Workman*** test. *See* ***State v. Gamble***, 154 Wn. 2d 457, 469, 114 P. 3d 646 (2005). Where the State charges second degree felony murder, the State does not have to prove intent to kill, or any mental element as to the killing itself. ***In re Personal Restraint Andress***, 147 Wn. 2d 602, 614, 56 P. 3d 981 (2002).

In ***Andress***, the Court pointedly criticized the harshness of the Washington felony murder statute. *Id.*, at 415, quoting Justice Sanders' dissent in ***Tamalini***, 134 Wn. 2d at 746. In ***Bowman v. State***, 162 Wn. 2d 325, 172 P. 3d 681 (2007), the Supreme Court again remarked upon the harshness of the statute. *Id.*, at 334. The Court specifically pointed out that second degree felony murder could be predicated upon assault in the third degree, "which made little sense". *Id.* Nevertheless, the Court noted the will of the Legislature, which specifically nullified ***Andress*** through near immediate legislation. *Id.*, at 335. Justice Sanders again strongly criticized the harshness of the felony murder statute which permitted a murder conviction without proof of any *mens rea*. *Id.*, at 337-338, Sanders, J., dissenting.

In this case, the trial court heard the defendant's argument and pointedly questioned how manslaughter in the second degree could be a lesser-included offense, given the law in Washington. The court correctly ruled that manslaughter is not a lesser-included offense of felony murder. There was no error.

b. Instructions on lesser-included offenses are authorized by state statute and case law, not the constitution.

The defendant makes an extensive argument that he had a constitutional right to an instruction on manslaughter. App. Br. at 35 ff. The right to a lesser included offense instruction is a statutory right, not a constitutional right. *See* RCW 10.61.006; *see also* ***Tamalini***, 134 Wn. 2d at 728; ***State v. Scott***, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). This right arises from RCW 10.61.006, which provides:

> In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

Generally, under the 5th, 6th, and 8th Amendments to the United States Constitution, a defendant is entitled to an instruction on a lesser-included offense only in a capital case. *See* ***Hopper v. Evans***, 456 U.S. 605, 611, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); ***Beck v. Alabama***, 447 U.S. 625, 628, 100 S. Ct. 2382, 65 L. Ed2d 392 (1980). But, due process does not require instruction on a lesser-included offense in a non-capital case. In ***Beck***, the United States Supreme Court held that, where the defendant's life is at stake, the Alabama capital murder statute was unconstitutional as it was deliberately structured to result in a death sentence. *Id.*, at 638.

In ***Hopkins v. Reeves***, 524 U.S. 88, 96, 118 S. Ct. 1895, 141 L. Ed 2d 76 (1998), the Supreme Court reviewed a Nebraska capital case of felony murder. *Id.*, at 91. The defendant requested that the jury be instructed on both murder in the second degree and manslaughter, which, he argued, were lesser included offenses of felony murder. *Id.*, at 92. Under Nebraska law, the defendant was not entitled to an instruction on a lesser-included offense to felony murder. *Id.*, at 92. The Court held that, although a capital case, the Constitution did not require an instruction on a lesser-included offense. *Id.*, at 96.

The Court recognized that, within the limitations of ***Beck***, the States are free to determine under their own statutory or case law what offenses constitute lesser included offenses of the charged crime. *Id.*, at 96, 100, 101. "We have never suggested that the Constitution requires anything more." *Id.*, at 97. The Court noted examples from several jurisdictions with favor, including ***State v. Berlin***. *Id.*, at 97, note 6.

The defendant in the present case makes a similar argument. The Washington legislature has the power to structure the criminal statutes as it sees fit, including lesser-included offenses. The state Supreme Court decides on the validity and proper application of those statutes. The trial court denial of the defendant's request for a lesser-included instruction on manslaughter, like Mr. Reeves, did not violate the federal or State Constitutions.

c. Procedural due process in criminal cases is governed by ***Medina v. California***.

The defendant argues for the Court to adopt or employ the procedural due process analysis set forth in ***Mathews v. Eldridge***, 424 U.S. 319, 334–335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *See* App. Br. at 35ff. But, in criminal cases, the analysis from ***Medina v. California***, 505 U.S. 437, 443-446, 112 S. Ct. 2572, 120 L. Ed 2d 353 (1992) and ***Patterson v. New York***, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) is used.

In ***Medina***, the United States Supreme Court pointed out that in criminal law, "we have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." ***Medina***, at 443. It said that it must show restraint and deference to state legislation regarding criminal law and procedure. *Id.*, at 446. Quoting ***Patterson***, the Medina court stated:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'

Medina, at 445 (additional internal citations omitted).

This issue is settled under ***Medina***. Our Supreme Court concurs. *See* ***State v. Hurst***, 173 Wn. 2d 597, 601-602, 269 P. 3d 1023 (2012); ***State v. Heddrick***, 166 Wn. 2d 898, 904 n.3, 215 P. 3d 201 (2009). This Court is bound to follow Supreme Court precedent.

The defendant fails to demonstrate that an instruction on a lesser-included offense to a charge of felony murder is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Perhaps if the Legislature prohibited instructions on lesser-included offenses in for *all* charged crimes, the Supreme Court might find a due process violation. *See e.g.* ***Beck***, *supra*. But neither RCW 10.61.006, nor ***Workman***, ***Tamalini***, or ***Berlin*** are so extreme as to violate procedural due process.

4. THE DEFENDANT DEMONSTRATES NEITHER DEFICIENCY OF COUNSEL OR PREJUDICE THEREBY.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 685-687, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987).

Defense counsel can rarely be faulted for proposing an applicable pattern instruction. *See* ***Studd***, 137 Wn. 2d at 551. There, counsel had

proposed former WPIC 16.02 regarding self-defense. After the trial of Bennett, one of the cases consolidated with Studd's, WPIC 16.02 was found to be deficient. *See* ***State v. LeFaber***, 128 Wn.2d 896, 913 P.2d 369 (1996). Nevertheless, the Supreme Court declined to find Bennett's counsel deficient for failing to foresee this. ***Studd***, at 551.

a. Voluntary intoxication instruction.

As pointed out above, WPIC 18.10 is a correct statement of the law. It mirrors the statute and case law. Therefore, proposing that instruction was not deficient performance.

b. Lesser-included instruction regarding manslaughter.

Here, despite law clearly to the contrary, defense counsel tried to convince the court that manslaughter was a lesser-included offense of felony murder. As pointed out above, that is clearly not the law. This was genuine advocacy for the defendant for which trial counsel should not be faulted. It was certainly not deficient performance.

5. THE "REASONABLE DOUBT" INSTRUCTION DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS.

The language of WPIC 4.01 has been discussed, and affirmed, repeatedly over the years. In ***State v. Pitrle***, 127 Wn.2d 628, 658, 904 P. 2d 245 (1995), the trial court added a sentence: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Id.*, at 656. The

defendant argued that the "abiding belief" in the second part invited the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit. The Supreme Court concluded that WPIC 4.01 and the "abiding belief" sentence correctly defined reasonable doubt. *Id.*, at 658. In ***State v. Bennett***, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007), the Supreme Court most recently again affirmed the language of WPIC 4.01.

Division I of this Court recently discussed this same issue in ***State v. Federov***, 181 Wn. App. 187, 200, 324 P.3d 784 (2014). Federov challenged the court's reasonable doubt instruction similar to the one given in the present case. Federov relied on ***State v. Emery***, 174 Wn.2d 741, 278 P.3d 653 (2012), to challenge the "abiding belief" sentence, as the defendant does here. He specifically argued that the "belief in the truth" language invited jury to "search for the truth", much like the "speak the truth" closing argument found improper in ***Emery***, at 751. ***Federov***, at 200.

Citing ***Bennett***, and ***Pirtle***, the Court of Appeals rejected the argument. The Court distinguished ***Emery*** and found the "speak the truth" argument improper because it misstated the jury's role. But, read as a whole, the language of the reasonable doubt instruction accurately states the law. ***Federov***, at 200. There was no error, constitutional or otherwise, in the instruction in the present case.

D. CONCLUSION.

The defendant received a fair trial where the jury was correctly instructed. His attorney strongly advocated on his behalf. Unfortunately for the defendant, the law does not permit instruction on a lesser-included offense of felony murder, and the jury rejected his claim of alcoholic black-out.

The State respectfully requests that the conviction be affirmed.

DATED: February 11, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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